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I N D E X

PAGE

ORAL ARGUMENT

RE: Resort

17

1 THE CLERK: Calling case number 13-criminal-607,
2 United States of America versus Phillip Kenner and Tommy
3 Constantine. Counsels, please state your appearances for the
4 record.

5 MS. KOMATIREDDY: Good afternoon, Your Honor, Saritha
6 Komatireddy, for the United States. I'm joined by Matthew
7 Haggans, also an AUSA, as well as Diane Leonardo and Madeline
8 O'Connor, our forfeiture AUSAs, special agents Matthew Galioto
9 and Joshua Wayne, the TSA Agents on the case.

10 THE COURT: Good afternoon to all of you.

11 MR. BRISSENDEN: Good afternoon, Your Honor, Matthew
12 Brissenden, standby counsel for Mr. Kenner.

13 THE COURT: Good afternoon, Mr. Brissenden.

14 MR. KENNER: Mr. Kenner, pro se defendant.

15 THE COURT: Good afternoon, Mr. Kenner. And Mr.
16 Talkin and Mr. Constantine, are you on the phone?

17 MR. TALKIN: Yes, we are.

18 MR. CONSTANTINE: Yes, Your Honor.

19 THE COURT: All right. So I scheduled this
20 conference for a number of reasons. I know Mr. Kenner, you had
21 requested through Mr. Brissenden that you not have to appear as
22 it related to the issues with regard to the resort and the
23 plenary forfeiture order issue, but I'm going to discuss also
24 other things related to the sentencing. So that's why I wanted
25 to make sure you were here.

1 So, and then a couple of other miscellaneous issues
2 have come up which I guess I'll try to address the bail issue
3 first, just so we can resolve it. First of all, the Court is
4 aware that Mr. Constantine's wife executed the bond in Nevada,
5 is that correct?

6 MR. TALKIN: Yes, Your Honor.

7 THE COURT: So we now have a copy of that, which is
8 being docketed here. The Government submitted a letter which
9 I'm sure Mr. Talkin and Mr. Constantine have seen on October
10 8th, indicating that there was some application to change the
11 registration with respect to the airplane, so Mr. Talkin, you
12 want to address that?

13 MR. TALKIN: Yes, Your Honor. I've looked into that.
14 And that has nothing to do with us beyond the extent that Mr.
15 Gonchar (phonetic) had called Mr. Constantine and asked him
16 some questions. But Mr. Constantine has nothing to do with it.
17 And it's his position, he has no ownership in that. So he has
18 no right to do anything with that plane. So it has nothing to
19 do with him, he didn't instigate it. And had nothing to do
20 with it. So, I don't think that's an issue at all.

21 Along similar lines, just so Your Honor, there was
22 also the issue of the Trustee.

23 THE COURT: Yes.

24 MR. TALKIN: And Mr. Constantine has resolved that
25 issue. He, with the lawyers in Arizona figured out that there

1 was a way he could assigned or could appoint at least a
2 temporary Trustee for a long term temporary Trustee. And that
3 has been done. So, he is no longer the Trustee. I think the
4 term now is the Trustee is a special Trustee and that Trustee
5 will stay in place until -- and won't be changed without notice
6 to the Court and the Government.

7 THE COURT: Okay. So let me just ask the Government,
8 first on the issue of the airplane, I know you're pointing to
9 testimony during the trial that suggested some type of group
10 interest, but do you want to address, do you want to respond to
11 what Mr. Talkin said?

12 MS. O'CONNOR: Your Honor, that's useful information,
13 we have, for purposes of forfeiture, because the plane is
14 subject to forfeiture, we have asked the FAA not to go through
15 with the registration. If the Government obtains additional
16 information related to that plane we'll let the Court know.

17 THE COURT: Okay, and then on the trust, it sounds
18 like, does the Government agree that that issue is, that the
19 proposed resolution is okay?

20 MR. HAGGANS: That was all news to the Government,
21 Your Honor, I did speak with counsel for the other claimant
22 earlier this week. And she did not, she did not raise this
23 issue. It's possible it was something that happened --

24 MR. TALKIN: It just happened in the last -- it just
25 happened, so.

1 THE COURT: All right, well --

2 MR. TALKIN: I was actually preparing an email to the
3 Government about it. But it just happened.

4 THE COURT: All right, you can look into it, you can
5 let me know if you have any issues, okay?

6 MR. HAGGANS: Absolutely, Your Honor, thank you.

7 THE COURT: All right.

8 MR. TALKIN: And Your Honor, I have paperwork I'll
9 forward to the Government.

10 THE COURT: Okay, good. Second thing is, as you
11 know, I did issue the motion denying Mr. Constantine's motion
12 for a new trial. I was looking at Mr. Kenner's motion for
13 reconsideration of his motion. And there was one thing I just
14 wanted to ask the Government to provide the Court, which I
15 don't think should be hard to provide. One of the issues Mr.
16 Kenner raised was the venue issue, and the Government stated
17 their position, that they believe that it's waived by the
18 failure to raise it in connection with the motion for
19 acquittal. But and stated that the Government would provide
20 briefing on the merits if the Court requested it.

21 I would like the Government, when I say briefing on
22 the merits, I just want the Government just to, so I don't have
23 to go fish for it for myself, just to highlight the portions of
24 the trial transcript and/or exhibits that would establish the
25 venue that is articulated in the indictment. I know the wire

1 transfers are laid out in the indictment. And the, with
2 respect to the property, closing on Long Island, taking place
3 with respect to the property. So if the Government could just
4 submit a short letter pointing us to the evidence in the record
5 with respect to that.

6 MS. O'CONNOR: Yes, Your Honor.

7 THE COURT: Could you do that within a week from
8 today?

9 MS. O'CONNOR: Yes, Your Honor.

10 THE COURT: Okay. And Mr. Kenner if you want to
11 respond to that. I'm just going to ask them to provide the
12 citations to the record. I have your other legal arguments with
13 respect to venue, but I'll give you a week to respond to what
14 they're submitting. Do you understand what I'm telling them
15 to do?

16 MR. KENNER: I just couldn't hear, Your Honor.
17 Because of my hearing --

18 THE COURT: You had put in this issue about venue on
19 your renewed motion, and I'm telling the Government, even
20 though they think it's waived, just to give me the citations to
21 the trial where their theory of venue, which is laid out in the
22 indictment, the wire transfers and the closing on the property,
23 relates to the Long Island property, to give me the cites to
24 the transcript where that was placed in evidence. So they're
25 going to give me a letter within a week of that. I don't know

1 that it requires any response, but I was going to give you one
2 more week after they submit it to put in anything you want to
3 respond to, just on that issue, okay?

4 MR. KENNER: Yes, sir.

5 THE COURT: All right.

6 MR. TALKIN: Your Honor.

7 THE COURT: Yes.

8 MR. TALKIN: I have one issue on, and it's not about
9 your decision, but in your decision, the most recent one on the
10 ineffective assistance, I believe it was in a footnote you said
11 that to the extent that Brady issues were raised, they were
12 waived. And I just want to tell the Court what's kind of been
13 going on. Basically I've been asking the Government to
14 reproduce to me what they've, what they produced concurrent
15 with the two discovery letters they pointed to in their
16 responses. I know they're working on it and it's not easy. But
17 I haven't gotten that yet, and that's why it hasn't been
18 addressed yet.

19 I have about 20 boxes in my office that were given to
20 me third hand and it's impossible for me to tell what discs or
21 what goes with what. So I can't figure out what was turned
22 over. So I've been waiting to get that. So I just, I
23 understand that there hasn't been action on the Brady aspect,
24 and maybe there isn't a Brady issue. But I'm not 100 percent
25 convinced yet. So I just need to wait for the Government to

1 give me the reproductions of what they produced with those
2 letters. And then I'll be able to either say there is or is
3 not a Brady issue. Or at least an argument for a Brady issue.

4 THE COURT: Okay, does the Government want to respond
5 to that?

6 MS. O'CONNOR: Your Honor, our position is that the
7 defendant is making the suggestion that there's a Brady issue,
8 but without any basis. He's admitted himself that he has not
9 actually looked at the discovery. There's no indication that
10 the discovery did not go out as it was represented that it went
11 out. We have, as we've cited to the Court, a record of turning
12 over the contents of Mr. Kenner's devices, both to Mr. Kenner
13 and after privilege review to Mr. Constantine. We stand by
14 that record. Discovery is long over in this case.

15 THE COURT: All right.

16 MR. TALKIN: Your Honor, I'm not saying that there's
17 anything intentional that happened here. The problem is, when
18 downloads happen from phones, often it's my experience, not
19 everything makes it. Not everything is in readable portion,
20 sometimes it comes out just in code. I don't know. But from my
21 discussions with Mr. Kenner, it seems that, and I don't know
22 whether this is the case or not, but it seems that some of the
23 stuff may not have gotten to the defense. And it's my
24 obligation to track this down. And the only way I know how to
25 do that is to ask them to reproduce what they gave so I can

1 look at it. Otherwise it's impossible for me to tell.

2 I don't disagree with their statement that yes,
3 discovery is over and that they gave what they gave. I just
4 need to firm up what they gave. And the only, the best way to
5 do it is, and the only way I can tell to do it, is for them to
6 reproduce it. They must have it segregated somewhere where
7 they can just reproduce what they gave with those two letters.

8 THE COURT: Is that a difficulty for the Government
9 to do?

10 MS. O'CONNOR: Honestly, Your Honor, we don't have it
11 easily. I have attempted to locate it and have not been able to
12 locate it so far. It was two physical productions that were
13 physical discs that we don't have electronic copies of. And at
14 this point it's --

15 THE COURT: Well, I guess I thought maybe I
16 misunderstood what you said last time. I thought you said you
17 retained a copy of what was produced, or did I misunderstand
18 it. The Government doesn't have a copy of what it produced?

19 MS. O'CONNOR: Right now we cannot find a copy of
20 those two productions. No, Your Honor, we don't have an
21 electronic copy of that production. It was an extremely
22 voluminous production of 65,000 or so documents.

23 THE COURT: But you didn't keep a copy of the disc
24 that you produced?

25 MS. O'CONNOR: Unfortunately Your Honor, it looks

1 like we cannot find the disc from four years ago at this point.

2

3 THE COURT: And you don't have -- and Mr. Talkin, you
4 and your client don't have the discs either? I don't
5 understand. Do you have the discs the Government produced or
6 you don't?

7 MR. TALKIN: I don't know if I do, it's hard to tell,
8 there's -- there are so many discs and documents that they
9 relate to, I can't tell what is what, that is the whole point.

10 THE COURT: Okay, why don't I suggest this then, you
11 know, why don't you bring whatever you have in terms of the
12 discs that, and meet physically with the Government and allow
13 the Government to look at those discs and see if they can help
14 you locate where those text messages are within those
15 productions. I can't think of any other better way of doing it
16 given that the Government can't find a duplicate. All right?
17 If you're having trouble. Is the Government willing to do
18 that, if he sits down with you and gives you the discs?

19 MS. O'CONNOR: Honestly, Your Honor, I'm willing to
20 trying whatever the Court asks us to try. But I fear that
21 essentially we're going into a project that involves going
22 through megabytes or terabytes or data, and I don't actually
23 know if we're going to be able to sort through that in any sort
24 of timely manner. And I'm not, I don't believe the defense has
25 a made a showing of any sort of basis to now sort through

1 discovery from years ago and find a needle in a haystack. This
2 case, these text messages that the defense counsel is referring
3 to, first of all, they were referenced in discovery letters
4 multiple times, and they were referenced at trial. And they've
5 been quoted and referenced in multiple post trial filings.
6 Never at any of those years has any defense attorney or
7 defendant said, well, the Government is talking about these
8 text messages, but we never got them. This is the first time
9 it's coming up, years afterwards. And it seems just, it seems
10 like it's coming out of nowhere and it's a way to delay the
11 proceedings.

12 THE COURT: Well, it's not delaying anything because
13 we have other things going on. But again, you're saying it's
14 going to be very difficult, but if the Government retained its
15 own copies of these, that's usually the easiest way to resolve
16 these things. Your Honor, we have a copy of these and I know
17 some of them have been referenced, but not every single text
18 message was referenced during the trial. I have no reason to
19 believe they weren't on the discs. But, and clearly some of
20 them being referenced shows that it was --

21 MR. TALKIN: Well, Your Honor, I can clear that up
22 for a second. The ones that are referenced at trial are from a
23 different batch of text messages. The ones we're talking about
24 here are not, were not brought out at trial. That's why
25 they're new and that's why I couldn't ask for them before

1 because I didn't know about them because I didn't know about
2 them until before. That's the problem. And that's why we need
3 to see -- I don't know whether they're talking about set A of
4 text messages or set B of text messages. I'm not disputing
5 that some text messages were turned over. But it looks like
6 from the trial transcript they're in a totally different format
7 than the text messages we're dealing with here.

8 THE COURT: Are documents searchable in any way on
9 those productions, like by word or any -- like, how do you
10 locate documents within those discs?

11 MR. TALKIN: Mr. Kenner probably is in the best
12 position to answer that.

13 THE COURT: Mr. Kenner.

14 MR. KENNER: Yes, Your Honor?

15 THE COURT: On the productions by the Government are
16 you able, if you were trying to find text messages would you be
17 able to search them in some electronic way to find where they
18 are, as opposed to looking at every single document?

19 MR. KENNER: At this point no, because the --

20 THE COURT: Put the mic a little closer so they can
21 hear you.

22 MR. KENNER: I'm sorry, Your Honor. At this point no
23 because as Your Honor knows about two years ago the one
24 external hard drive that I was given disappeared at MDC and
25 since then the 200 or so discs have also disappeared --

1 THE COURT: I'm talking about --

2 MR. KENNER: -- out of my property.

3 THE COURT: I'm not talking about necessarily your
4 particular discs. To the extent that Mr. Talkin is in
5 possession right now of those discs, the same ones that were
6 produced to you, would they be, when you had them, were they
7 searchable by words, in other words, to locate a particular
8 document. I assume they were, right?

9 MR. KENNER: The ones with text messages, no. They
10 were not searchable. I had to go through all 81,000 one by one.

11 THE COURT: All right, again, I'm going to make, to
12 the extent the Government believes this is delaying things, we
13 have other things going on right now. I want Mr. Talkin, you
14 to meet with the Government, show them the discs that you have
15 from those productions and see if the Government could
16 determine where those text messages are.

17 MR. TALKIN: We'll endeavor to do that, Your Honor.

18 THE COURT: All right.

19 MR. TALKIN: Thank you.

20 THE COURT: With regard to, before you get to the
21 preliminary or the forfeiture issues that have been raised
22 since the last conference, the, in terms of the sentencing
23 itself, I did receive the sentencing memos from Mr. Constantine
24 September 25th, Mr. Kenner October 8th, excuse me, October 7th
25 and October 8th. And I did just grant the Government until

1 October 14th for its additional, to its response.

2 I was a little confused because when Mr. Brissenden,
3 you asked me to excuse me Mr. Kenner's appearance, you said
4 something about him continuing to work on his sentencing
5 submissions. So what else am I expecting from Mr. Kenner?

6 MR. BRISSENDEN: No, Your Honor, I don't anticipate
7 at this point filing anything additional in writing. I think
8 the idea was just to prepare for the hearing itself.

9 THE COURT: I understand, okay, all right. And so
10 I'm going to adjust the, I'm getting a lot of information to
11 try to digest with respect to the sentencing, and I'm still
12 working on the forfeiture. So I'm going to propose another
13 date in early November where I'm going to resolve the issues
14 regarding the loss amount and the objections to the PSR.

15 The other thing that's happening is, the probation
16 officer, I spoke to the probation officer a week or so ago, and
17 although she did do an addendum addressing Mr. Kenner's, I
18 think Mr. Kenner's lawyer's first objections to the presentence
19 report, she had not put in an addendum addressing Mr. Kenner's
20 pro se objections. So she told me that she would be able to do
21 in the next week or two. So that's also an additional reason
22 why we need a few more weeks before we can go forward with the
23 conference regarding the guidelines issues.

24 So I was going to propose November 5th or November
25 14th for that. Mr. Talkin, are you available on the 5th or the

1 14th?

2 MR. TALKIN: The 14th is better, but I could figure
3 out the 5th if it had to be for the other, for the Government
4 and Mr. Brissenden.

5 THE COURT: I think the 14th is probably okay. Is the
6 14th okay with the Government?

7 MS. O'CONNOR: Yes, Your Honor.

8 THE COURT: All right, so and then on that date I'll
9 set the sentencing date. So November 14th at --

10 MS. O'CONNOR: Can I request the morning, Your Honor?

11 THE COURT: Hold on one second, we don't have a
12 calendar out here. You said morning?

13 MS. O'CONNOR: Yes, Your Honor, if that's possible.

14 THE COURT: 10 a.m.

15 MS. O'CONNOR: That works for me.

16 THE COURT: Okay, Mr. Talkin, 10 a.m. on the 14th?

17 MR. TALKIN: That's fine, for me, thank you, Your
18 Honor.

19 THE COURT: Okay, so moving to the issues regarding
20 the resort. Obviously the Court received a series of letters
21 since the last conference from all the interested parties,
22 including the DCSL, the DCSL parties, the bank, CSL Properties
23 submitted a couple of letters. Mr. Wolinsky submitted a
24 letter. The Government submitted a September 27th letter
25 stating its position. Some of the, and there were some letters

1 in response to that. So, and obviously a lot of their letters
2 were asking me to continue to try to have the Government
3 address, before any preliminary order of forfeiture is entered,
4 some of the issues that everybody is concerned about.

5 So I did, let me just ask the Government, I have a
6 couple of things I want to ask the Government. And I have to
7 just say, these letters still give me a continuing concern that
8 the Government has not -- the Government's response doesn't
9 fully address what they believe will happen upon the Court if
10 the Court enters a preliminary order of forfeiture with respect
11 to the resort. It's kind of radio silence from the Government
12 on that.

13 So for example, in one of the letters CSL Properties
14 puts a list of questions. As I read the questions, I was
15 thinking the Government hasn't really told the Court what they
16 intend with respect to that. So, I want you to answer some of
17 these questions just so I can understand, has the Government
18 really thought out what would happen. Obviously we talked about
19 this many times, and all these interested parties, and I would
20 say to some extent at least, to a large extent, innocent
21 parties, have, I think legitimate concerns about what's going
22 to happen to the resort, the value of the resort, upon the
23 entry of a preliminary order of forfeiture, that I don't think
24 the Government has addressed exactly what's going to happen.

25 So, maybe I'm missing it, maybe I don't remember.

1 But one of the questions is, who is going to manage the day to
2 day activities of the property during the ancillary
3 proceedings, including the management of the project that are
4 currently underway. So, what's the Government's response to
5 that?

6 MS. O'CONNOR: Your Honor, we met with the bank to
7 discuss these issues. And we made it clear to the bank that we
8 would work with them and they had told us that they would, they
9 wanted Jati (phonetic) to continue in the management of the
10 resort. And we said we were willing to work with them to that
11 end.

12 They did raise a concern that perhaps Jati would not
13 continue to manage the resort if his interests would be
14 forfeited. And then we said, well, we'd welcome discussions
15 about any management company that would suggest to put in
16 place, that we would perform our own due diligence and search
17 for management companies. We've in fact spoken with the
18 marshals of Complex Assets Group, they're prepared to have a
19 management company go in place if one if necessary. We've taken
20 all the steps needed to prepare for that eventuality.

21 However, we are willing to work with the bank on that
22 issue. They did not come forward with any suggested management
23 companies of their own. But we have certainly broached the
24 topic with them and we're ready to deal with that issue if it's
25 an -- if it becomes an issue for us.

1 In terms of preserving the value of the resort, if
2 Your Honor will recall, the Government met with the bank and
3 the bank had many suggested modifications to the preliminary
4 order. And the Government incorporated essentially every one
5 of the requested modifications, other than those aimed at Scope
6 (phonetic), and included in those two requested modifications
7 were modifications that the bank asked for. One, language
8 stating that the Government would not immediately seize the
9 resort. And two, language providing that the protective order
10 would remain in effect. The Government incorporated those
11 provisions. Those were their requested provisions to preserve
12 the status quo of the resort.

13 So the Government did that. The Government in the
14 meantime has been preparing for the forfeiture of the resort if
15 it's so ordered. The marshals are preparing to conduct an
16 appraisal of the resort during the week of November 18th.
17 They're in the process of preparing a business valuation of the
18 resort. The Government is in the process of retaining an
19 expert to assist with an interlocutory sale of the resort.

20 We insure the Court that the Government is taking the
21 appropriate steps to plan for the forfeiture of the resort in
22 the event it is ordered forfeited.

23 THE COURT: They did submit, I put it under seal,
24 because I believed it was confidential business information, an
25 appraisal of the resort from, I think it was 2017. So is that,

1 I know the Government said it's going to have its own appraisal
2 done. But I assume that that was helpful to the Government to
3 see, right?

4 MS. O'CONNOR: Yes. Actually, Your Honor, the US
5 Marshals Complex Asset Unit did a, performed a comparison of
6 the two most recent appraisals of the resort. One was in 2015
7 and then one was in 2017. And they determined that one of the
8 major reasons for a near \$200 million discrepancy in the value
9 of the resort is that the reported over head costs for sales,
10 marketing and administration more than doubled in the two
11 appraisals. And importantly, we believe that those companies
12 that are paid the overhead expenses are the companies that are
13 owned and operated by Jati.

14 And that difference explains the reason in the value
15 change in the two appraisals. But the marshals are prepared
16 to perform their own appraisal, and we're willing to work with
17 the bank in finding another independent appraisal if necessary.

18 THE COURT: When you incorporated everything that the
19 bank wanted, I thought from the letters I read from the bank,
20 that they were hopeful through their negotiations with the
21 Government that there could be some language proposed to the
22 Court with regard to an interlocutory sale that would be part
23 of the preliminary order itself, or am I wrong about that?

24 MS. O'CONNOR: The Government's position has always
25 been that no language about an interlocutory sale is necessary

1 to be included in the POF. And in fact entering into any kind
2 of agreement with the Jati at this stage when we still haven't
3 determined who the other potential owners are, could prejudice
4 the other potential owners. There are other owners who have a
5 right to be heard with regard to an interlocutory sale and
6 those owners will not be known to the Government until the
7 ancillary proceeding commences.

8 THE COURT: What about the issue regarding the fact
9 that the resort is in Mexico and any attempt by the Government
10 to forfeit this, assuming there's not some settlement reached
11 that it could be going on for years that there's no clear path
12 to forfeiting real property in Mexico? What's the Government's
13 response to that?

14 MS. O'CONNOR: Well, there is a process, Your Honor.
15 The money laundering asset recovery section of an injustice,
16 we've been speaking with any attorney who's specifically
17 assigned to Mexico to handle forfeitures in Mexico and she has
18 assured that you know we're able to move forward with this as
19 well as the Marshals Complex Asset Group which handles
20 forfeitures of this size and foreign property as well. So we
21 are not without a means to handle the forfeiture and we are
22 taking all the steps down that road in the meantime.

23 So although there is concern about the time, if you
24 recall we modified the POF to carve out thousands of interests
25 which as a result will shorten the length of any kind of

1 ancillary proceeding. So at this point the process should be
2 much more streamlined and we're prepared although we remain
3 hopeful that we'll be able to reach a settlement with the bank
4 once an order is entered and we start moving along that path.

5 THE COURT: Well, one of the things the bank said
6 that they proposed to the Government, and maybe you've already
7 answered this to some extent, is negotiating a discounted lien
8 and making you know a cash payment that could go to the victims
9 in the case and he suggested the Government was not interested
10 in that. And obviously the CSL properties representatives
11 were, seem to be very interested in that potential resolution.
12 Do you want to respond to that?

13 MS. O'CONNOR: We do, Your Honor. The Government
14 cannot agree to that proposal because in a criminal case there
15 are only two ways that a victim can be paid restitution. One
16 way is when a defendant is convicted and the Court orders the
17 defendant to pay restitution and then the other way is when
18 Amwar (phonetic) in its sole discretion determines that
19 forfeited funds should be applied towards restitution. So
20 entering into this kind of agreement would be an end around
21 Amwar's sole discretion and the law as a forfeiture law. We're
22 not able to enter into that kind of agreement.

23 THE COURT: What's Amwar's?

24 MS. O'CONNOR: Amwar's would be the money laundering
25 asset recovery section of main justice. There the section of

1 main justice the attorney general --

2 THE COURT: I know but when you say it's an end
3 around, why couldn't you potentially engage them now to say
4 look, we have this proposal on the table. We want you to
5 consider it now. The whole point of these efforts, I think is
6 to try to avoid a long period of time that is going to go by if
7 the Court does order the forfeiture where there's all this
8 delay and ambiguity about what's going to happen that could
9 completely undermine the value to everybody. So is there any
10 reason why to the extent that they are the ones who would make
11 that decision that that discussion couldn't begin even now?

12 MS. O'CONNOR: Your Honor, that requires several
13 factors in terms of determining the restitution amount, the
14 forfeiture amount, whether other assets are available for the
15 forfeiture. It's premature, that normally occurs after the
16 fact and also it would make more sense if they're willing to do
17 something like that to settle their claim for a lower amount
18 rather than require a payout and then circumventing the
19 process. So it's not that we're not willing to consider it.
20 We would have to do it in a way that would be, I think more
21 streamlined in accordance with the rules --

22 THE COURT: All right. And Mr. McSouther (phonetic)
23 his letter I know you mentioned and the Government did carve
24 out all the different interests as the Court had urged in the
25 revised proposed order, but Mr. McSouther objects to the fact

1 that he says there's a long list of people who continue, who
2 are in the forfeiture order who he thinks there is not a
3 sufficient basis to have their interests subject to that
4 preliminary order. So have you had a discussion with him about
5 information they could provide regarding those individuals to,
6 you know avoid them necessarily being placed in the order? I
7 don't know who all those people are.

8 MS. O'CONNOR: Your Honor, the individuals listed in
9 there are primarily former bank Danske (phonetic), current or
10 former Danske Lehman (phonetic) or DCSL employees. And the
11 carve out was intended to exclude innocent third parties who
12 have no connection to the litigation and the conduct at issue.
13 So the individual and entities who were included in the carve
14 out who are excluded from that carve out were those who were
15 central to Jati's and the resort's operations in the
16 transactions.

17 The Government has a good faith basis for excluding
18 Danske's employees from the carve out. If Your Honor will
19 recall, John Kaiser (phonetic), a witness who testified and
20 whose testimony was helpful in the convictions of the
21 defendants, filed a letter with the Court on February 28th of
22 2019. And his letter contained serious allegations about
23 Jati's management of the resort that the Government cannot
24 disregard.

25 It also contained allegations about the bank's

1 employees. Mr. Kaiser stated that two Danske's employees who
2 were specifically excluded from the carve out, during the
3 course of servicing the loan routinely stayed at Jati's private
4 residence rather than at hotel rooms off property that were
5 reserved by them.

6 Mr. Kaiser's letter also alleges that at least one
7 former Lehman employee who played a significant role in
8 arranging the original loan for the resort, owns a percentage
9 of the resort through a straw person. He further alleges that
10 same former Lehman employee attempted to purchase property from
11 the resort through an entity in recent years, the Silver Peak
12 Seal (phonetic) that has been discussed in Court.

13 In addition, the bank has engaged in a very atypical
14 side agreement with Jati in its most recent loan modification.
15 The bank is designated their loan documents confidential but
16 the Government is more than willing to discuss it with the
17 Court if the Court is so inclined.

18 THE COURT: No, I don't need all the details right
19 now.

20 MS. O'CONNOR: Your Honor, I would like to also
21 mention that in an appraisal that was performed by the bank,
22 the appraiser specifically noted a conversation with a resort
23 employee who told the appraiser that sales at the resort
24 occurred to family and friends first. And we would also like
25 to point out that we learned that in just a matter of couple

1 weeks ago, Jati sold his personal residence at the resort even
2 though it was very clear through conversations and the Court
3 proceedings that the Government intended to forfeit his home
4 down there .

5 So the Government has a good faith basis for
6 scrutinizing claims if any such claims were to be filed with
7 the Court.

8 THE COURT: All right. But it sounds like with
9 respect to the ongoing management of the resort if there is a
10 preliminary order of forfeiture that you have been discussing
11 with I guess Mr. Kostolampros, correct?

12 MS. O'CONNOR: We have.

13 THE COURT: So I don't know if he wanted to be heard
14 or any of the other people who are here. I see Mr. McSouther
15 but if you want to say anything I'll hear from you. Go ahead.

16 MR. KOSTOLAMPROS: Thank you. Thank you, Your Honor,
17 George Kostolampros of Venable for Danske Bank. Yes, Your
18 Honor, I would like to address several of the items that you've
19 raised with the Government. We think all of those issues that
20 CSL has raised and you've raised here remain. The Government's
21 assurance that they've spoken with their attorneys within DOJ
22 and that there's some plan out there, that still doesn't take
23 into account the time period for which ultimately they would be
24 some finality here in what we believe would be an interlocutory
25 sale.

1 And what happens in the resort during that time
2 period? There's liquidity needs, funding. How long would Mr.
3 Jati stay on the property? Who knows? Those things are left
4 unresolved. And we've come up with a plan that we've raised
5 with the Government that we think provides no risk solution
6 here for the Government frankly. And it guarantees an up-front
7 payment to victims here and I don't quite understand why you
8 would want more of a discount over our claim when if you take
9 our appraisal, the latest appraisal that we provided, we don't
10 think that even that discounted claim is going to be met in the
11 sale.

12 But nevertheless, what we believe here provides the
13 safest avenue for insuring that the resort stays as a going
14 concern, or at least the best option for that case and provides
15 a no risk solution for the Government.

16 THE COURT: Yes, I'm not sure, I understand what
17 you're saying and obviously that caught my eye when I read the
18 letters, but given the way the decisions work, I'm not sure
19 that that could be done in, you know at this point. I don't
20 think they could sit down with you in a room, you know over,
21 you know the next couple of days and reach that type of
22 agreement. There are factors that have to be considered. They
23 want to have their own appraisal done which I'm glad to hear
24 that they're lining up rather than waiting.

25 So and that ultimately may be the best proposal but

1 I'm just not sure that that's the type of thing to avoid any
2 risk --

3 MR. KOSTOLAMPROS: But Your Honor --

4 THE COURT: -- can be done in advance. But the
5 bottom line is, one of my concerns when I was reading these
6 letters, is the Government had no plan for the ongoing
7 operation of the resort. They were going to throw everybody
8 out. Okay, and that would be a big problem. But it sounds
9 like that they are wisely in consultation with the bank. They
10 said they're open to considering all the different options of
11 keeping Mr. Jati in place. If you have a different proposal.

12 MR. KOSTOLAMPROS: We don't, Your Honor, but the
13 consultation with the bank is really just us coming to the
14 Government and asking look, would you consider these proposals
15 and getting no. It's not really much of a consultation.

16 THE COURT: When you say --

17 MR. KOSTOLAMPROS: They have consulted with us about
18 who they're talking to, who could come in and manage the resort
19 if Mr. Jati was not. And frankly we don't even know how that
20 could possibly be done. How could the Government who has got
21 no jurisdiction over this property in Mexico substitute some
22 entity to go in there and run the resort.

23 THE COURT: I'm not saying, I don't know either.
24 Those are complicated questions. But what I'm saying to you
25 is, you know your client obviously has a lot of money at stake

1 here. Who are you, what is your proposal as to how in the
2 event of a appointed forfeiture, how to leave undisturbed to
3 the greatest extent possible, the day to day operations of the
4 resort? Have you proposed to the Government this is what, we
5 want Mr. Jati to continue to run it or?

6 MR. KOSTOLAMPROS: Well, we've asked that question
7 and we've asked the Government, look, do you have a problem
8 with Mr. Jati? If you want somebody else there. We didn't
9 come to them and said we want Mr. Jati there. We left it up
10 for them and said look, we've been through this in four years
11 now. You tell us what you plan on doing. And they said well,
12 look, if you have an issue with Mr. Jati, you let us know.
13 Well, we don't have one. You're the ones that have
14 consistently said there are issues but yet you're fine with him
15 being there. They said they're fine with him.

16 We said look, the best --

17 THE COURT: So that's a good thing, right?

18 MR. KOSTOLAMPROS: That is a good thing. And the
19 best thing we said is look, how long is this proceeding going
20 to take? We have no clarity on how long an interlocutory sale
21 process will go. What we can tell, and I've been through this
22 before in other cases as well. The Government takes a lot of
23 time. It's just the way that things work. This case has taken
24 a lot of time.

25 But we would like some sort of agreed to procedure

1 and I understand, we're not going to be able to come to that
2 agreement in within the next week or two. But what we can do
3 is agree in principal first let's agree that there should be an
4 interlocutory sale. Put that in the preliminary order of
5 forfeiture.

6 Allow for further court proceedings, further
7 discussions between these parties --

8 THE COURT: But you heard what she said regarding
9 that. She said that there are people who obviously would have
10 a potential say in that who the Government feels it would not
11 be proper for them to agree to that in advance without giving
12 them an opportunity to at least to be heard on that.

13 MR. KOSTOLAMPROS: Your Honor, our suggestion to them
14 and we provided them with a draft preliminary order with our
15 suggestions in there. It came from them originally. They
16 proposed, I believe it was in May, of an interlocutory sale
17 process. And ultimately we didn't go forward with that process
18 then. But they were willing to propose it then. Why now, now
19 come back and say we can't do that. Every interested third
20 party will have an opportunity to object to the interlocutory
21 sale process. It's not going to happen right now. It will
22 happen after a preliminary order is issued. So they'll have an
23 opportunity to submit their claim and be heard and object to
24 the interlocutory sale process.

25 And we would ask for the Court to move and the

1 Government to move as expeditiously as possible once that
2 happens.

3 THE COURT: And you think having that language in the
4 order, -- explain to me exactly why having that particular
5 language in the order will address all the things that you're
6 concerned about happening?

7 MR. KOSTOLAMPROS: Because we want to show to
8 potential buyers here that there is an agreed to solution here.
9 What we would want is to quickly move forward after we have
10 that language in the preliminary order of forfeiture as part of
11 submission to this Court on a motion for an interlocutory sale
12 a commitment by the bank to fund the resort during this
13 interlocutory sale process. A commitment for sums to actually
14 go to the Government for ultimately how they want to distribute
15 it. Our idea was that it would go to victims but of course
16 they have to get approval from Amwars but they could get that.

17 But ultimately what that does is send a message of
18 number one, the resort has a commitment, a funding through the
19 interlocutory sale process and there is an interlocutory sale
20 process agreed to and it will, what will have is some detail in
21 there about what the timing ultimately will be. This is all
22 about assuring some viable path so that potential buyers who
23 come on the resort, and the buyers who are there now, don't
24 have a mass sale frankly. You know this is about assuring as
25 best as we can the value of the resort. Frankly, I'm left

1 bewildered as to why we can't agree to this. I mean I don't
2 understand what the downside is to the Government ultimately.

3 They've raised in their letter the only thing that
4 we've asked for is recognition of our discounted claim. But
5 we've always proposed this in conjunction with what DOJ policy
6 is. And DOJ policy is to these settlement say look, you know
7 the Government always reserves the right to the extent they
8 find evidence that a bank is not an innocent owner. That they
9 could, the agreement would be null and void.

10 And that gets me to another point that I wanted to
11 raise with Your Honor. We've raised it in our letter as the
12 last point is, two employees of the company are named in the
13 forfeiture order. I mean, the Government doesn't appreciate
14 what that means for employees of a bank to be named in a
15 forfeiture order as if they did something wrong. We've raised
16 to them those employees are willing to submit an affidavit and
17 a declaration which I have right here waiting to give to them
18 saying look, they have no ownership interest in here. Take
19 their names out of there.

20 But they're unwilling to do so and the only thing
21 that they could point to is because they stayed over at Jati's
22 home. I mean they don't have any evidence that these two
23 employees have any ownership interest on the resort. And
24 frankly there will be evidence that will be subject to perjury
25 that look, they don't have any ownership interest. But this is

1 what we're dealing with here. We're in this acrimonious
2 position when we should not be. We should be collectively.
3 Truly is in the bank's interest to get the most that it can out
4 of this resort property. And which ultimately it benefits
5 everyone and we're willing to discount our loan and provide an
6 up-front guarantee to victims, to the Government to ultimately
7 give to victims.

8 THE COURT: You want to respond, Ms. O'Connor?

9 MS. O'CONNOR: Yes, Your Honor. It is true the
10 Government proposed a preliminary order involving language
11 about an interlocutory sale. We were not incorporating a
12 stipulation. In an effort to reach an agreement with them, we
13 referenced a sale and put in language that we would forfeit
14 proceeds of a sale and in the event a sale did not occur, we
15 would forfeit the resort. But that did not satisfy the bank.

16 And I think this is a very clear example of the
17 difficulty we've been having with the bank. The bank
18 constantly changes its mind. For example, if Your Honor will
19 recall we met with the bank on September 5th, the day of the
20 last court conference to discuss a sale of the bank's note. To
21 that end, we requested certain documentation including evidence
22 of bank's outstanding loan balance.

23 However, we did not receive any of the requested
24 documentation from the bank. And then on September 13th,
25 approximately one week later, the Government had a phone

1 conference with the bank during which time the bank changed its
2 position and demanded that the Government include language in
3 the POF regarding an interlocutory sale of the resort as
4 opposed to the note.

5 When we asked why the bank no longer wanted to
6 discuss the sale of their note, the bank's counsel stated that
7 a sale of the note was no longer a path the bank wanted to
8 pursue. And this has been the pattern over the past four
9 years.

10 MR. KOSTOLAMPROS: Your Honor, that's not correct.
11 It's not about the bank not wanting to pursue it. This has
12 been a fluid situation. We've gone to the Government for four
13 years and asked them what are you planning on doing. And
14 they've told us consistently you're getting ahead of yourself.
15 We don't even know. The only reason we've gotten the clarity
16 that ultimately there will be an interlocutory sale. We
17 proposed a sale of our note, but we proposed it and said would
18 you even consider it. They said okay, look, come back to us.

19 The bank went and spoke to experts, consultants and
20 said look, could you sell, could we sell this note and they
21 came back to us and said no, you can't because there's no
22 clarity as to who the owner would be. No one is going to
23 purchase your note when they don't know who the owner is going
24 to be. So we went back to them and we didn't demand anything.
25 We went back to them and said look, we can't sell this note.

1 We need to consider, can you consider going back to an
2 interlocutory sale.

3 THE COURT: Ms. O'Connor, what's the wording for a
4 moment and any caveats that would be in there, what is the
5 issue with the Government putting in language regarding its
6 intention to the extent its able to have an interlocutory sale
7 of the resort itself? Why is that not some type of language
8 that could be included?

9 MS. O'CONNOR: Well, we actually proposed that
10 language to them.

11 THE COURT: Of the resort?

12 MS. O'CONNOR: Of an interlocutory sale of the resort
13 and in the event that didn't occur within a specified time
14 period that we would forfeit the resort directly and they
15 rejected that language.

16 MR. KOSTOLAMPROS: We did, Your Honor, at the time
17 period because we thought we could get a note sale quicker.

18 THE COURT: Okay.

19 MR. KOSTOLAMPROS: We thought it would take too long
20 for an interlocutory sale of the resort.

21 THE COURT: Okay, but how about at this point?

22 MR. KOSTOLAMPROS: At this point, we've gone back and
23 we said we can't even get a bank note sale. What we could do
24 is the interlocutory sale process, an agreed to interlocutory
25 sale process. Go forth as quickly as we can through that. And

1 that's what we proposed to them. We went back with this very
2 same language that they proposed to us.

3 THE COURT: So you're agreeable to the language that
4 they had proposed?

5 MR. KOSTOLAMPROS: Yes, they had proposed it to us.

6 THE COURT: I know you initially said no but you're
7 saying now you're agreeable to that.

8 MR. KOSTOLAMPROS: We are because we went back to
9 them and said we would like, we wanted to consider the bank
10 note sale because we would think it would take too long for an
11 interlocutory sale.

12 THE COURT: I understand that. Okay, so if they're
13 agreeable to the exact language the Government proposed, then
14 what's the problem with that?

15 MS. O'CONNOR: Because Your Honor, none of this
16 language is necessary for the order and given the constant
17 change in position which at this point occurs almost weekly, we
18 would rather have entry of the order and then be able to pursue
19 a path. We would like to point out that in 2016, we presented
20 the bank with a buyer for its note. Goldman Sachs they
21 wouldn't even pursue the possibility. So again it's very, it's
22 a difficult situation when it's a constantly moving target that
23 the Government can't seem to meet. So it seems to make the
24 most sense that the order be entered when this language isn't
25 required in the first place. And then for the Government to

1 reach an agreement that would be, that would form the basis for
2 a separate stipulation which there's no deadline required for
3 that.

4 THE COURT: I know but don't you --

5 MS. O'CONNOR: And the Government can move forward.

6 THE COURT: -- understand the whole point, when you
7 say it's not required, nobody in this courtroom believes this
8 is required but they're suggesting they believe and apparently
9 many others who are innocent parties who are watching this
10 believe that this would be helpful to retain the value of the
11 resort and avoiding any disturbance where people are trying to
12 start sell their ownership interests and you have not
13 articulated why this is, if this is something the Government
14 proposed you know, I'm not faulting the Government, that other
15 offers that were put out there, but where we are now and it
16 seems like there is no, a better option for the Government, for
17 you know innocent third parties than an interlocutory sale.
18 That seems to be like the clear best option from everybody's
19 standpoint. So even if the Government doesn't believe it's
20 necessary, even if the Government for whatever reason doesn't
21 believe that that language would have any positive impact in
22 terms of the retaining the value and the ongoing operation of
23 the resort, you haven't articulated what the harm would be if
24 this is what the Government believes is ultimately going to be
25 the best option and again whatever concerns you have about

1 third party being able to raise objections and raise their own
2 rights, it sounds like the first time around you already put in
3 language that said if it's not, if it ultimately doesn't
4 happen, then the Government would retain the ability to forfeit
5 the resort. So I guess I haven't heard you tell me why this is
6 a bad idea at this point, whether it's necessary or not. Why
7 is it a bad idea to put that language in?

8 MS. O'CONNOR: Your Honor, the Government doesn't
9 believe it's a bad idea. It's just an idea that was proposed
10 and rejected.

11 THE COURT: Okay.

12 MS. O'CONNOR: And at this point we would like to
13 move forward and pursue the option. But if the Court would
14 like us to submit another preliminary order including the
15 language we originally suggested we will do so.

16 THE COURT: I would like that. Okay.

17 MR. KOSTOLAMPROS: And Your Honor, again, I reiterate
18 our point is we would like our employees --

19 THE COURT: So these two employees, you said you have
20 affidavits from them?

21 MR. KOSTOLAMPROS: We have affidavits from them,
22 David Daniels and Peter Hughes.

23 THE COURT: Is the Government, you were reciting to
24 me some issues you had with some of the names in there, but I
25 don't know whether these affidavits would be sufficient for the

1 Government.

2 MS. O'CONNOR: Your Honor, the Government would have
3 to decide whether an affidavit would be acceptable, although it
4 doesn't, we would like to make sure that we're protecting our
5 interests in the way it's written as of now protects those
6 interests to the best of our abilities.

7 THE COURT: I know the Government was articulating
8 its good faith basis for having various names in there, but if
9 the Government doesn't have any indication other than they were
10 at a party, is that what you said?

11 MR. KOSTOLAMPROS: They've spent time at Mr. Jati's
12 house.

13 THE COURT: Yes. If that's the only evidence the
14 Government has, that's giving it, trying to retain their
15 rights, that seems a pretty thin basis to put someone in an
16 order because they spent some time there. If they put in a
17 sworn statement --

18 MR. KOSTOLAMPROS: That's my point, Your Honor, is
19 that they're putting in a sworn statement that says they don't
20 have an ownership interest.

21 THE COURT: Right.

22 MR. KOSTOLAMPROS: And frankly we've tried to talk to
23 the Government. And we're willing to take any language that
24 they'd like in there.

25 THE COURT: All right. They're going to look at it,

1 and I'll ask the Government to submit to the Court within a
2 week the proposed new forfeiture order, plenary forfeiture
3 order. And if the Government, hopefully they'll be satisfied
4 and those names will be out, okay.

5 MR. KOSTOLAMPROS: Thank you, Your Honor.

6 THE COURT: All right.

7 MR. WOLINSKY: Good afternoon, Your Honor, Marc
8 Wolinsky from Wachtell Lipton, but I'm representing myself.

9 THE COURT: Yes, yes.

10 MR. WOLINSKY: Hopefully ably. Your Honor, maybe
11 there's some progress you've heard today, and I say that maybe
12 because what I actually hear is a lot of delay and a long
13 process. And what the Government has done is put a cloud over
14 the property, and frankly it's raining on us, the homeowners.

15 One issue that I have been adamant with, with the
16 bank and with Mr. Jowdy, and if I had an opportunity I'd be
17 adamant with the Government, but the Government actually hasn't
18 seen fit to engage with the homeowners. The property is
19 currently, we bought into a master development plan. It
20 provides generally for low-rise properties there are certain
21 areas dedicated to hotels, three golf courses of a unique
22 character.

23 What I've been clear with the bank, and I think I
24 have the bank's agreement, is that if there's going to be a
25 sale the purchaser has to honor the existing master development

1 plan and operate the property in the way we bought into. We
2 did not buy it, obviously I go to Cabo San Lucas quite often,
3 I'm going this week, next week. There are portions of Cabo San
4 Lucas that are developed like Miami Beach and there are
5 portions that are developed like Diamante. And we don't want
6 someone to come in and change our homes, our property, into
7 Miami Beach with a row of high-rise hotels lining the beach.
8 It's not what we bought, it's not what we believe we're
9 entitled to.

10 So our very deep fear is that someone will come in
11 and change the character of our resort and our homes. And if
12 there's going to be a sale the purchaser in the order has to
13 commit to develop the property in accordance with the master
14 development plan. That is a huge, huge issue for us, Your
15 Honor.

16 THE COURT: And you said the bank is on board with
17 that?

18 MR. WOLINSKY: I've had extensive conversations with
19 the bank on that. I believe they're on board with it.

20 THE COURT: But your concern is that the Government
21 is going to somehow overrule that?

22 MR. WOLINSKY: Absolutely. The Government will, and
23 I'll just be very frank, and I've had the conversation with Mr.
24 Jowdy. It could be that the highest bidder is someone who
25 wants to build high-rise hotels along the beachfront and

1 destroy the home sites that were sold behind that beachfront.
2 And frankly, I'm fortunate enough to be on the beachfront, and
3 I didn't buy a home with the idea that a hotel was going to be
4 erected in front of my home.

5 And that is a huge issue for us, Your Honor, I've
6 constantly been beating --

7 THE COURT: I know, but you don't believe you have a
8 legal basis to resist that based upon these agreements that you
9 already have in place, you believe that those can be
10 overwritten?

11 MR. WOLINSKY: We don't, our rights are not, this is
12 not a U.S. condominium plan. It's Mexico.

13 THE COURT: All right. And is the Government aware
14 of this issue, has the Government thought about this issue?

15 MS. O'CONNOR: Yes, Your Honor. Well, to begin with,
16 we'd like to point out that Mr. Wolinsky's interest has been,
17 is one of the many thousands carved out. So we will not be
18 forfeiting his interest.

19 THE COURT: No, but this relates to the nature of the
20 sale.

21 MS. O'CONNOR: Yes, Your Honor. And in terms of
22 that, what he's asking the Government to do is something that
23 if the property were to be sold in the normal course and it
24 were not subject to a forfeiture proceeding, but for argument's
25 sake if the resort itself were sold he wouldn't be given any

1 kind of guarantee that he's asking the Government to guarantee
2 now.

3 If it's not in writing, if it's something in writing
4 it will, the resort will be sold subject to those agreements.
5 But if it's not in writing we can't guarantee anything that he
6 wouldn't have been guaranteed in the first instance.

7 THE COURT: Right.

8 MR. WOLINSKY: The difference, Your Honor, is that
9 this is now a forced sale. This is a forced sale. This is not
10 a voluntary sale.

11 THE COURT: No, but I think what she suggested, if
12 the bank turned around and was going to sell the property
13 because of the default, for example, you would be in the same
14 position you'd be in pursuant to this forfeiture.

15 MR. WOLINSKY: But right now Mr., the likelihood, if
16 the note sale had gone through the likely purchaser was Mr.
17 Jowdy who was committed to the master development plan. And
18 Your Honor, the homeowners are not without recourse. In the,
19 as a practical matter if the homeowners are up in arms the
20 value of the property will be diminished. Ultimately it's in
21 the, and this was my argument with the bank as to why the bank
22 ultimately agreed to provide that in a sale it would require
23 the purchaser to honor the master development plan because the
24 bank recognized, like the homeowners recognized, and as I hope
25 the Government will recognize, that if the homeowners are up in

1 arms the value of the property ultimately is going to be
2 diminished.

3 THE COURT: Well, but I think, I understand the
4 issue. I just, I don't know that you're going to, and I assume
5 in connection with any interlocutory sale the Court through the
6 ancillary proceeding would see supervision over that, correct?

7 MS. O'CONNOR: Supervision, I'm sorry, I want to be
8 sure.

9 THE COURT: Regard to any agreements with regard to
10 the interlocutory sale of the property.

11 MS. O'CONNOR: We would, yes, we would be involved in
12 the process. And again we would make sure to the best of our
13 abilities that any agreements that are in writing, those
14 agreements would continue through the new ownership.

15 THE COURT: These are in writing, aren't they? Or
16 they're not writing, I thought you said that --

17 MR. WOLINSKY: There's a condominium plan, and
18 actually I'm having a call this afternoon with Mexican counsel
19 which is a place where I didn't want to be. But my
20 understanding is that unlike the U.S. condominium plan our
21 rights as homeowners are limited relative to what you would see
22 in the U.S.

23 THE COURT: Okay. But whether the, the rights, it's
24 still in writing, though, or you don't know if --

25 MR. WOLINSKY: Yes, but we, there's nothing, there

1 are environmental laws that would keep you from doing certain
2 things --

3 THE COURT: I understand that.

4 MR. WOLINSKY: But Your Honor, we are being put in a,
5 let me step back. Your Honor is being asked to do something
6 that I frankly don't think you have jurisdiction to do. This
7 is a Mexican property. Your Honor there have been a lot of
8 focus on the corporate entities and which entity received which
9 dollars. But if Your Honor, I'd like to focus Your Honor if I
10 may on actually how this property is owned. So you can see why
11 I think ultimately if we can't come to a consensual resolution
12 the result should be that the Court declines order forfeiture
13 of the resort.

14 THE COURT: I know, but the, this is not, as you
15 know, and you may disagree with this, but it's the law. This
16 is not the process, this is not the timing of that. This is a
17 preliminary order of forfeiture. You would have the right as
18 would other people have the right to make those arguments to
19 the Court before a final order was issued. That's the way the
20 law works here so this is not the time for me to start
21 considering your arguments with respect to those types of
22 issues, right?

23 MR. WOLINSKY: But Your Honor, with respect I think
24 you do, you are the gatekeeper here. And you have to be
25 satisfied that you have jurisdiction to issue the order that

1 the Government is asking you to enter. And respectfully, I
2 don't believe you have the power to order the sale of real
3 estate in Mexico that's held in a Mexican trust.

4 THE COURT: If that's so clear then everything you're
5 concerned about, you shouldn't be concerned about at all. If
6 it's so clear I don't have the power to do it, why are you even
7 concerned about this?

8 MR. WOLINSKY: Because the entry of the preliminary
9 order of forfeiture itself is going to be hurting the
10 homeowners. And the property and the resort.

11 THE COURT: All right. What's the Government's
12 response to the Court lacking jurisdiction to even enter this
13 order?

14 MS. O'CONNOR: Your Honor has jurisdiction under 18
15 USC 83. I believe it's Subsection (k), but I'm not sure. I'd
16 have to check.

17 MR. WOLINSKY: Your Honor, I'm not arguing statutory
18 jurisdiction, I'm arguing the Court's power as a U.S. Court to
19 effect real estate interests in Mexico that are held in a
20 Mexican trust.

21 THE COURT: I know, but that's, how am I going to
22 determine the answer to that question? They say they have
23 experts who are advising them that they're going to be able to
24 do this in Mexico. You're telling me it's not possible. But
25 you know, that's not a basis to not award forfeiture here,

1 where their ability to implement it is a different issue.

2 MR. WOLINSKY: Your Honor, I don't think you have the
3 power. And I say that, I say that respectfully and there's an
4 anecdote with Judge Sweet that reminds me that I should be very
5 careful to say that.

6 THE COURT: No, when you're saying the power, they're
7 saying that power, statutory power exists. Whether or not
8 they'll be, whether Mexico under their laws will allow the
9 Government to effectuate what the Court has ordered under, that
10 I have the power to do under U.S. law is a different question.
11 I have the power to do it under U.S. law, whether or not
12 they're going to be able to, you know, similar judgment I
13 could issue a judgment here, whether or not that judgment is
14 going to be enforced in another country is whole different
15 question, right?

16 MR. WOLINSKY: Who is your order directed to, that's
17 my point, Your Honor. the property is owned by, the property
18 is held in trust by a Mexican bank. You are not in a position
19 to order a Mexican bank to do anything. The Mexican bank is
20 not here.

21 THE COURT: So where, the Mexican bank will have a
22 opportunity to be heard in the ancillary proceedings if they
23 think I don't have the jurisdiction to do this, that, right.

24 MR. WOLINSKY: The Mexican bank may not even show up.

25 THE COURT: Does the Government want to respond to

1 that?

2 MR. WOLINSKY: Your Honor, it goes back to --

3 THE COURT: I understand what you're saying. I'm not
4 suggesting, I'm not suggesting that this is a, you know, all of
5 these thoughts have gone through my mind as well. I think I
6 asked the Government that question I think three months ago
7 with regard to the forfeiture of real property in other
8 countries. So I understand the complexities of it.

9 But again, I'm not, that, I have the statutory power
10 to do it under the forfeiture laws of the United States so I'm
11 not sure there would be a basis for me telling, you know,
12 victim's money has flown into, flowed into this resort to just
13 leave it on the table and say I'm not, this is a complicated
14 thing, I don't know how the Mexican banks are going to react to
15 this, I'm not going to allow the Government to pursue that. I
16 think that --

17 MR. WOLINSKY: I'm not saying that, Your Honor. I
18 think what I am saying is that what is subject to the Court's
19 jurisdiction are legal entities that were the conduits for the
20 flow of illicit funds. Those legal entities are second place
21 beneficiaries under the trust. Those second place
22 beneficiaries, that second place interest is subject to
23 forfeiture because those are subject to Your Honor's
24 jurisdiction, those were the instrumentalities of the crime.

25 THE COURT: Right.

1 MR. WOLINSKY: But the trust itself is not here.

2 THE COURT: Ms. O'Connor, do you want to respond?

3 MS. O'CONNOR: Yes, the Trust might not be here but
4 the property is subject to Your Honor's jurisdiction and once
5 the Government gets a final order of forfeiture it serves it on
6 the Mexican Government who then executes it on behalf of the
7 United States. That's the procedure.

8 However, we're hoping to avoid that by entering into
9 some of agreement for an interlocutory sale. But there is
10 certainly a means, and Your Honor does have jurisdiction.

11 THE COURT: All right. Okay. Thank you, Mr.
12 Wolinsky.

13 MR. WOLINSKY: Thank you, Your Honor.

14 THE COURT: Mr. McCuller.

15 MR. SOUTHER: Sorry, Your Honor, may I be heard?

16 THE COURT: Sure.

17 MR. SOUTHER: Thank you. Thank you, Your Honor,
18 Thomas Souther, Fries, Fork & Sullivan on behalf of the DCSL
19 parties. The first part I'd just like to address, Your Honor,
20 is that, you know, again another accusation today from the
21 Government, unsubstantiated, that Mr. Jowdy has violated a
22 court order and sold his property. It's not true. I don't
23 know where they come up with this, whether it's, you know,
24 they're sourcing their information from, you know, Mr. Kaiser
25 who seems to be the source of a lot of their information. But

1 it's just, it's another example of them disparaging Mr. Jowdy
2 in open court.

3 THE COURT: So he still has that residence?

4 MS. O'CONNOR: He owns that property. He
5 understands, he would like to see it but he knows he can't
6 because it's subject to a protective order. And he knows he
7 can't sell it. But for them to suggest that he's gone ahead
8 and done that and flouted an order, it's just, it's very
9 frustrating, Your Honor.

10 THE COURT: All right. All right, what's the bottom
11 line issue then?

12 MR. SOUTHER: The bottom line issue is we've been
13 trying to promote a collaborative solution because, you know,
14 even the entry of a preliminary order is going to have an
15 impact on sales. We've said this repeatedly. The Government
16 doesn't seem to accept that.

17 THE COURT: I know, but we've got --

18 MR. SOUTHER: What is Mr. Jowdy supposed to do?

19 THE COURT: We've come a long way from the first time
20 you raised that issue with me. The Government has put
21 carveouts in for the homeowners to be able to engage in
22 transactions. They're, to my agreement they are not taking the
23 position that they're going to remove Mr. Jowdy, they're
24 working with the bank and I assume they were to speak to you,
25 that if, you know, it may be that the current management team

1 will stay in place while they pursue this interlocutory sale.

2 So I think we've made a lot of progress despite Mr.
3 Wolinsky telling me I made no progress since, you know, three
4 or six months ago. So I don't know what, they're willing to
5 consider having Mr. Jowdy stay exactly where he is, they're
6 willing to put in the language of our interlocutory sale and
7 the preliminary forfeiture order that's proposed to the Court.
8 So what else can they do, what else can the Court do to
9 minimize the risk to the resort?

10 MR. SOUTHER: Well, I think if the Court excluded
11 from the preliminary order the notion that the resort would be
12 sold, then that would --

13 THE COURT: No, that's not happening. That's not --

14 MR. SOUTHER: That would make a difference.

15 THE COURT: I know. Your thinking is completely
16 different than my thinking on that.

17 MR. SOUTHER: Well, no, but Your Honor, put yourself
18 in Mr. Jowdy's position. He's got to meet face to face with
19 prospective purchasers of real estate and has to walk them
20 through the hurdles that are now going to have to be overcome.
21 How are we even supposed to make a single sale, let alone
22 enough sales to maintain the operations.

23 That's why, you know, the bank's proposal of coming
24 in, coming to a, like a pre-planned agreement so that it's,
25 you're able to tell the story to people as they come in and try

1 and make a determination as to whether they're going to
2 purchase a timeshare membership or purchase a real estate lot,
3 they at least know what the plan is and they know that there's
4 an institution that has resources to fund this process during
5 an interlocutory sale. Right now this project is on the brink
6 of insolvency.

7 THE COURT: I know, but the bank has a lot of money
8 already invested in this. I have no reason to believe that
9 they're going to just walk away and not try to preserve the
10 value of the, they have a built-in incentive to avoid some of
11 these things that you're suggesting might happen, right?

12 MR. SOUTHER: I mean, absolutely. And Mr. Jowdy is
13 willing to work with the bank to try to maximize the value.

14 THE COURT: It sounds like both Mr. Wolinsky and I
15 assume Mr. Jowdy and the bank are working collaboratively. The
16 issue has been, your concern that the Government would somehow
17 upset everything that everybody else agrees would be in the
18 best interest of the resort. And as far as I can tell whatever
19 obstacles there existed with regard to that conversation
20 before, the Government has made substantial progress on it, in
21 terms of the carve-out to the homeowners. You know, we say
22 that's a difficult conversation, it's a lot less difficult than
23 it was with, you know, the Government's initial order because
24 you can tell them if they're going to be able to transact with
25 respect to their property without interference from the

1 Government.

2 The Government is looking for an interlocutory sale
3 as quickly as possible and the Government is not going to
4 insist that they, you know, try to manage a resort in Mexico
5 because they would be ill equipped to do that. So those,
6 that's a lot to work with. The situation obviously is not
7 ideal, but it is what it is. The money got into that resort.

8 So I cannot think of other things that can be done to
9 minimize the risk. What you're suggesting I don't think is the
10 appropriate solution. But you know, that's all I can think of
11 at this point.

12 MR. SOUTHER: Well, the only thing I would add, Your
13 Honor, you know, I just would refer you back. Early in
14 February, February 22, we submitted a letter and attached to
15 that was a District Court opinion from the Western District of
16 Louisiana in which the other, and it's not directly analogous
17 because frankly this situation is unique, I've not encountered
18 a forfeiture case like the one that is before the Court right
19 now.

20 THE COURT: Me neither.

21 MR. SOUTHER: But in that instance, Your Honor, the
22 Court certainly was weighing the issue of whether proceeds from
23 a tainted bank account which were then used to make a mortgage
24 payment on the defendant's residence, whether that was enough
25 to then warrant the forfeiture of the entire residence. And

1 the Court concluded no, it wasn't, it would be excessive.

2 And I'm suggesting it's analogous here.

3 THE COURT: Yes.

4 MR. SOUTHER: And so what the Court did, the solution
5 there was the Court, you know, focused on entering an order, a
6 preliminary order with a dollar value of what the forfeiture
7 amount was, what the amount was of the illicit proceeds that
8 may have passed through this. And again, you know, I think one
9 of the other things we've --

10 THE COURT: I don't think that situation is analogous
11 to here and I, you know, I've lived with this case for a lot of
12 years. Your client's role in this and the money that went into
13 this development, you know, I think Mr. Wolinski used the
14 example of Facebook, I don't know, one of the letters had
15 something along those lines.

16 MR. SOUTHER: Right, right, Facebook.

17 THE COURT: Yes, I don't see that as, I understand
18 that argument. But this, I don't view this as that type of
19 situation. This money went in, Mr. Jowdy took the money. I
20 understand a lot has gone on since then, but this is not some
21 peripheral, you know, investment that is now sort of upsetting
22 an entire resort that was built independently of that money.
23 That was part of the core money back then.

24 MR. SOUTHER: Right, but it was a small fraction,
25 Your Honor, of the original money that was, that was used as

1 part of a downpayment.

2 THE COURT: Yes, okay, I don't want to get into a
3 debate about this. I know, I saw that case. And again, you
4 know, I think you can tell from having the conferences we've
5 had on this and how much, how many times I've gone back to the
6 Government to tell them to, you know, speak to you, to speak to
7 the bank and to come back with more language. So I'm sensitive
8 to everything that you're saying. But I can't think of a
9 better language in a preliminary order than what we're now up
10 to. But okay, thank you.

11 MR. SOUTHER: Your Honor, I understand. I would just
12 ask the opportunity to then have the Government speak with us
13 because they actually have not been speaking to us. They've
14 refused to speak to us, saying that they would only speak to
15 the bank and they would then decide whether it was necessary to
16 speak to us. We would like to be part --

17 THE COURT: Speak to you about, like the operation of
18 the resorts or to you about what, the --

19 MR. SOUTHER: No, no, about trying to come up with a
20 resolution to this that is going to preserve the value.
21 Because that's our objective, trying to preserve the value.

22 THE COURT: Okay, all right. Yes, look, the
23 Government, obviously the primary conversation is with the
24 bank, but obviously you should include Mr. Souther to the
25 extent that one of the options is, one of the considerations is

1 keeping Mr. Jowdy involved and who's going to run the resort.

2 It makes sense to have Mr. Souther involved as well, okay.

3 MS. O'CONNOR: Yes, Your Honor.

4 MR. SOUTHER: Thank you, Your Honor.

5 THE COURT: All right, thank you.

6 MR. KOSTOLAMPROS: Your Honor, may I add a couple,
7 address a couple of points. Thank you, Your Honor, I just have
8 three points that I wanted to raise. One is addressing Mr.
9 Wolinsky's point about, you know, these promises that
10 essentially, about the master plan of the resort. As you
11 recognize the bank is in a position where it can't force a
12 potential buyer to do frankly whatever. I mean ultimately we
13 would like to work with Mr. Wolinsky and get the best result
14 that frankly would make it, make this process just go quicker
15 and easier for everyone.

16 So that's one. Number two is as part of that we
17 think it's important that ultimately whatever is sold is the
18 equity shares, because that will then bring all of the
19 obligations that the equity had agreed to. So that's one way
20 of addressing that issue.

21 Then the third point that I should have raised
22 earlier is the Government had raised some agreement, side
23 agreement or I forget how they had phrased it, but atypical,
24 that every agreement that the bank has made with, on the resort
25 since the forfeiture order or the protective order we've run by

1 the Government. So I'd be happy to talk to them at some point
2 if they want to raise these issues, as opposed to raising it to
3 the Court without even addressing with us.

4 Again, we've addressed all of these issues with them
5 before we finalized any agreement.

6 THE COURT: All right, I don't think that --

7 MR. KOSTOLAMPROS: So those are the points I just,
8 just for the record.

9 THE COURT: Yes, I understand that. But I don't, I
10 mean, you can have a conversation with them, but the bottom
11 line is they're willing to put the interlocutory sale language
12 in there. So whatever concerns that they have and their
13 reasoning behind their position I don't think is critical at
14 this point for purposes of the Court. But I understand why you
15 wanted to clarify that.

16 MR. KOSTOLAMPROS: Thank you.

17 THE COURT: All right, so, and in terms of the
18 homeowners obviously my expectation, Mr. Wolinsky makes the
19 point that to the extent that the homeowners' interests are not
20 being considered at all, it's going to be the economic, you
21 know, that could create economic issues with regard to the sale
22 of the interlocutory sale. I mean, that makes sense as well.
23 It makes, I think from an economic standpoint as opposed from
24 an equitable standpoint it makes sense to engage Mr. Wolinsky
25 and the other homeowners to make sure that any sale goes

1 smoothly.

2 MR. KOSTOLAMPROS: Right.

3 THE COURT: So I think everybody is on the same page
4 with that. But obviously if the Court does enter a preliminary
5 order we'll continue to hear those types of issues, okay.

6 MR. KOSTOLAMPROS: Thank you, Your Honor

7 THE COURT: All right. All right, so I'm going to
8 ask the Government to put in a proposed revised preliminary
9 order by Friday, next weekend, is that okay?

10 MS. O'CONNOR: Yes, Your Honor.

11 THE COURT: All right. And then the Court will be
12 issue a decision soon thereafter, all right. All right, I'm
13 sorry, Mr. Kenner, do you have anything that you want to add?

14 MR. KENNER: Your Honor, I just listened to the
15 different parties here. Again, I have the same empathy that
16 the Court does and, for the guys who invested and weren't part
17 of these different deals. But Your Honor actually asked the
18 Government back on July 2, I think it was somewhere around page
19 25 of the transcript, to trace the money that was involved with
20 the loans that were given to Mr. Jowdy in order to be able to
21 determine what monies flowed through to this Mexican property
22 that we now have gone through 3-and-a-half years of
23 deliberation since 2016.

24 In 2016 the Government did trace the money. They
25 traced all of it. They traced it on Government Document #44

1 with Mr. Jowdy and his attorneys, and they admitted it in the
2 transcripts, I think at about page 66, 67 through IRS Agent
3 Wayne. And they also submitted Government #36 during
4 forfeiture, and I believe that traced the \$6 million and change
5 that went into the deal.

6 Of all the money that they traced from the original
7 loans that went personally to Mr. Jowdy that are, the
8 Government has documented in Mr. Jowdy's 3500 material. I
9 think it's KJ2 at page 24 and page 25. That loan agreement is
10 to Mr. Jowdy personally and he transitioned \$350,000 through to
11 his Capital account. That's the only money traceable through
12 to the Diamante Resort in Mexico. Zero dollars are traceable
13 through my LLC that was fully capitalized by my two European
14 partners and the Government did trace the money as Your Honor
15 has asked recently, as recently as July 2.

16 I have got tremendous sympathy for the homeowners
17 like Mr. Wolinsky and the others involved in the bank's issue
18 on what may or may not happen down there with the land being
19 stuck into a, in trust held by a Mexican bank. It's been an
20 issue we've had since 2009, and the Government today raised the
21 issue that in, I believe it's ECF628, Mr. Kaiser's letter of
22 February 28 of this year to the Court that although the
23 Government traced all of the funds Mr. Jowdy wants the Court to
24 believe that I stole all of the money and used it to buy
25 something in Mexico with.

1 The Court knows it didn't happen because of the
2 Government's own submissions. But everything Mr. Kaiser echoes
3 in that letter of February of this year, ECF628 is no different
4 than what myself and the other investors told the FBI over 10
5 years ago starting on June 24, 2009.

6 THE COURT: All right. I'll go back, I'll look at
7 some of the things you just listed, I've been going through
8 these things along with my clerk.

9 MR. KENNER: I understand. And I'll submit a very,
10 very brief letter to you just to summarize what I just said so
11 you have it all in one place, Your Honor.

12 THE COURT: All right. You have until Friday, okay.

13 MR. KENNER: Yes, I will get it to you as soon as
14 possible.

15 THE COURT: All right. All right, and thank you, Mr.
16 Brissenden, you do an excellent job, Mr. Brissenden, of
17 facilitating Mr. Kenner's submissions. So I appreciate that.

18 MR. BRISSENDEN: You're welcome, Your Honor.

19 THE COURT: All right, Mr. Talkin, is there anything
20 you want to add?

21 MR. TALKIN: No, thank you, Your Honor.

22 THE COURT: All right. So I think we have dates for
23 everything. Okay, are there any other issues from the
24 Government today?

25 MS. O'CONNOR: No, Your Honor. We would --

1 THE COURT: All right.

2 MS. O'CONNOR: I'm sorry.

3 THE COURT: Go ahead.

4 MS. O'CONNOR: We would just ask that when the
5 Marshalls do go down that they have full cooperation at the
6 resort properties so they can perform their appraisal, and that
7 any documents that they need in order to perform that appraisal
8 and business valuation will be produced to us.

9 THE COURT: From Mr.?

10 MS. O'CONNOR: The bank and/or the resort.

11 THE COURT: Okay. Well again, don't just send the
12 Marshalls down there, I would talk to both of the lawyers for
13 those, you know, clients here. You know, tell them what you
14 would need, what access you would need, what documents you
15 would need. And if there are any issues let me know. But it's
16 not in their interest to delay that process. Okay.

17 MS. O'CONNOR: Thank you, Your Honor.

18 THE COURT: All right --

19 MS. KOMATIREDDY: Your Honor, I'm sorry, if I can
20 just add one request. Given the sentencing time line, if we
21 could have until Friday to submit our, send something in
22 response I would appreciate it.

23 THE COURT: Yes, that's fine.

24 MS. KOMATIREDDY: Thank you, Your Honor.

25 THE COURT: All right, have a good weekend.

1 MS. O'CONNOR: Thank you, Your Honor.

2 MR. Wolinsky: Thank you, Your Honor.

3 MR. TALKIN: Thank you, Your Honor.

4 * * * * *

5 **C E R T I F I C A T I O N**

6 I, **TRACY GRIBBEN**, court approved transcriber,
7 certify that the foregoing is a correct transcript from the
8 official electronic sound recording of the proceedings in the
9 above-entitled matter.

10

11 /s/ **TRACY GRIBBEN**

12

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14 TRACY GRIBBEN TRANSCRIPTION, LLC October 23, 2019

15 Date

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